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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,

Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION and LYNN A. MATHESON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

Four Counties Water Users Association requests that the writ of certiorari prayed for by petitioners be denied.

OPINIONS BELOW

The relevant opinions of the Colorado Supreme Court are correctly cited by petitioners (Petition, p. 1). The texts of the opinions are contained in the Petition (Apps. A, B) and will be referred to herein.

JURISDICTION

Petitioners rely upon 28 U.S.C. §1257(3) to establish this Court's jurisdiction. As set out below in the Statement

and Argument, Respondent Four Counties believes the requirements of that statute have not been met.

QUESTION PRESENTED

Whether a state court's denial of a priority date for a water right claimed by a political subdivision of the state pursuant to state law presents a substantial federal question?

STATUTES INVOLVED

The statutory provisions involved are Colo. Rev. Stat. ch. 148, art. 9 and art. 10, §6 (1963), which set forth the procedure for adjudicating water rights. Respondent Four Counties does not believe the statutes cited by petitioners are relevant.

STATEMENT

Petitioners are political subdivisions of Colorado created pursuant to Colo. Rev. Stat., ch. 150, arts. 5 and 7 (1963). They filed claims to obtain water rights for the Rabbit Ear and Troublesome water projects in November, 1959, asserting 1959 priority dates. The claims were filed in a pending water adjudication proceeding for Water District 50. Water adjudications are held in water districts throughout the state. In these proceedings Colorado district courts are empowered to hear, adjudicate and settle "all questions concerning the priority of appropriations of water between owners and claimants of water rights drawing water from the same source within the same water district . . . ." Colo. Rev. Stat. ch. 148, art. 9, §2 (1963).

In March, 1962, Four Counties filed its claim for a water right in the same proceeding, asserting a 1958 priority date. When Four Counties appeared in the proceeding, petitioners asked to amend their claims and offer new and different proof, contending their appropriations were actually commenced in 1950 rather than in 1959 as they had previously testified. The District Court allowed this change

and awarded a decree with a 1950 priority date. Four Counties appealed and the Colorado Supreme Court reversed, holding petitioners' priority date to be 1959, as petitioners had first claimed. *Four Counties Water Users Ass'n. v. Middle Park Water Cons. Dist.*, 425 P. 2d 262 (1967), (Petition, App. B).

In April, 1962, one month after petitioners had amended their claims in Water District 50, a new adjudication began in Water District 58. Both Four Counties and petitioner Colorado River Water Conservation District promptly filed claims in the Water District 58 adjudication. Four Counties again claimed a 1958 priority date. Petitioner Colorado River Water Conservation District this time claimed a 1954 priority date for the Wessels Project, although it noted surveys were commenced by it in 1961. Some months later the same petitioner filed a claim for the Toponas Project asserting a 1951 priority date, but noting it commenced surveys in 1963. The District Court gave this petitioner decrees for the earlier dates. The Colorado Supreme Court reversed and held that the dates surveys were commenced by this petitioner were the proper priority dates. *Four Counties Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 425 P. 2d 259 (1967), (Petition, App. A).

The United States has never appeared in any of these proceedings and the government official who testified did so only under subpoenas issued at petitioner's request.

After the Colorado Supreme Court had received briefs, heard oral argument, and issued its opinions, petitioners filed motions for rehearing, raising for the first time matters argued here. The motions for rehearing were denied.

Up to the time motions for rehearing were filed with the Colorado Supreme Court, all evidence submitted and arguments made were directed to whether water rights with the claimed priority dates had been established under

the provisions of Colorado's water adjudication statutes. The Colorado Supreme Court held only that the District Court erred in setting priority dates. Its review of the facts in each decision is accurate and reflects those matters relevant to the questions before it.

ARGUMENT

I.

THE COLORADO SUPREME COURT'S DECISIONS ARE BASED ENTIRELY ON INTERPRETATION OF STATE LAW; THUS, NO FEDERAL QUESTION IS PRESENTED.

The Colorado Supreme Court awarded petitioners priority dates as of the dates they actually commenced surveys. Commencement of work by surveys, which are used to file maps with the State Engineer, has long been the kind of work that will initiate an appropriation under Colorado water law. *Four Counties Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 414 P. 2d 469 (1966); *Metropolitan Suburban Water Users Ass'n. v. Colorado River Water Cons. Dist.*, 148 Colo. 173, 365 P. 2d 273 (1961); *Taussig v. Moffat Tunnel Water and Dev. Co.*, 106 Colo. 384, 106 P. 2d 363 (1940), and cases cited therein. Despite this well established line of authority, petitioners subpoenaed a witness from the Bureau of Reclamation who testified about certain studies performed by the Bureau. Petitioners argued this evidence entitled them to a priority date for their claimed water rights which would have been much earlier than the dates on which petitioners commenced surveys. Petitioners argued this despite the fact that before Four Counties appeared they had asserted priority dates as of their commencement of surveys.

In a reasoned opinion, grounded in well established principles of Colorado water law, the Colorado Supreme Court rejected petitioners' contentions as follows: "It is an inexorable rule of Colorado water law that, in order to

establish a right to relate back to a point of time from which the priority is to commence, there must have been on the date claimed some act *evidencing an intent to take water* and apply it to a beneficial use." *Four Counties Water Users Ass'n. v. Colorado River Cons. Dist.*, 425 P. 2d 259, 261 (1967), (Petition, App. A-5). The court then cited numerous earlier Colorado Supreme Court decisions and concluded that petitioners' evidence of Bureau of Reclamation studies and reconaissance work was insufficient to initiate a priority under Colorado law.

In summary, petitioners appeared in state water adjudication proceedings and asked a state court to award them water rights which would be both granted and protected by state law. They were given water rights but with later priority dates than petitioners had sought. That is all the state court did. Thus, no "title, right, privilege or immunity . . . specifically set up or claimed under the Constitution, treaties or statutes of . . . the United States," as required by 28 U.S.C. 1257(3), is involved and this Court's jurisdiction cannot be invoked. *Durley v. Mayo,* 351 U.S. 277, 281 (1956); *Williams v. Kaiser,* 323 U.S. 471, 477 (1945).

II.

THE COLORADO SUPREME COURT'S DECISIONS SETTLED CONTROVERSIES BETWEEN CITIZENS OF COLORADO; THE FEDERAL GOVERNMENT WAS NOT INVOLVED NOR IS ONE OF ITS PROGRAMS JEOPARDIZED.

Petitioners obtained rights to water for the benefit of private citizens within their boundaries, just as Four Counties obtained a right to water for the use of municipalities on Colorado's eastern slope. This dispute has no bearing on federal policies or programs. The decisions did no more than settle where certain waters of Colorado streams would be used.

To Four Counties' knowledge no projects in western Colorado studied by the Bureau of Reclamation are affected by the Colorado Supreme Court's decisions except those that directly conflict with transmountain diversions of water by Four Counties or the City of Denver. Of all projects listed in a letter attached to the Petition (App. F), only Rabbit Ear, Troublesome, Wessels, Toponas, Juniper and Parshall are known to be affected. The first four are involved in this proceeding. A priority date for the fifth project, Juniper[1], is being challenged by Four Counties. A priority date for the sixth project, Parshall, is the subject of a protracted lawsuit between petitioners and the City of Denver.

All water rights petitioners may have obtained for projects listed in Appendix F of the Petition were obtained in Colorado district court adjudication proceedings. As a result, Colorado statutes protect these rights from later attack. After four years from entry of a decree, "all persons, associations and corporations shall be forever barred from setting up any claim to priority or rights to water for irrigation or other purposes in such water district adverse or contrary to the effect of such decree." Colo. Rev. Stat. ch. 148, art. 9, §17 (1963). It is believed most decrees petitioners have obtained for projects listed in Appendix F are more than four years old and so far as is known only those mentioned above are or could be under attack. Thus, only six of 30 projects listed could be affected and these are projects where the least amount of work has been done and money expended.[2]

The effect of the Colorado Supreme Court decisions

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[1]In 1960, the Juniper project was decreed a 1959 priority date in Water District 44. Two years later, several weeks after Four Counties had filed its claims, petitioner Colorado River Water Conservation District reopened the Juniper proceeding without notice to Four Counties and changed the date to 1954. Four Counties is now exercising its right under Colo. Rev. Stat. ch. 148, art. 9, §17 (1963), to challenge petitioner's 1954 Juniper priority date.

[2]It is interesting to note that no monies have been spent on the four projects directly involved since 1962. Compare petitioners' summary of evidence in 1962 (Petition, pp. 7-8) with Petition, App. F.

hardly goes beyond the decisions themselves. They settle priority dates between two organizations who propose supplying water for Colorado citizens. No other questions are presented or entities involved and no dual standard for establishing priority dates was or could be created by those decisions. The Colorado Supreme Court did no more than award petitioners the priority they had claimed before Four Counties appeared on the scene with its proposed transmountain diversion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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